these facts and circumstances were, or that the time factor was one to be considered, so as to justify him in entry under section 16. It would appear from his evidence as to chips being used that he received information by word of mouth from some other sources than himself.

In my opinion therefore this entry was not under the provisions of section 16 and therefore no presumption under section 16 of the Enactment arises therefrom.

It is however open to the prosecution to prove aliunde that the room at No. 4 Jalan Siew Nam was a Common Gaming House. If it is used once only for gaming and is open to the public it falls within the definition of a Common Gaming House. The prosecution evidence given by 2 Police Officers is that on entry they found the accused gambling at Pai Kau; the room was furnished only with a table and chairs round which accused were grouped; on the table was Pai Kow, dice, other implements and 180 counters; near the table was seated one of the accused with a further supply of counters and some money. As the learned Magistrate says there is no reason to doubt the evidence of the two Police Officers; the instruments on the table may be fairly taken to be gaming instruments; on this evidence the learned Magistrate held that the place was a Common Gaming House and in my view he held so correctly without any question of using a presumption.

Once it was established that the place was a Common Gaming House section 6 (ii) of the Enactment shifted the onus on to the accused to rebut the presumption that they were gaming. This, there is no doubt, they failed to do, and were rightly convicted by the Magistrate.

I certify therefore that no order is made by me on this application for revision and that the finding and sentence of the Magistrate shall stand.

No Order Made.

LOW YAT v. G. C. GRACE.

[Orig. Civil Juris. (Willan, C.J.) February 21, 1947]

Practice—Conditional Appearance—No provision for conditional appearance in the local law—1932 Rule 1 Sub-rules 12 and 21—Interpretation and General Clauses Enactment (Cap. 1), Section 33—Powers of Registrar under Section 7 (ii) (a) of the Federated Malay States Courts Enactment (Cap. 2).

In this case the plaintiff claimed damages against the defendant, an Assistant Commissioner of Police stationed at Kuala Lumpur. On the 30th day of December 1946, the Registrar granted the defendant leave to enter a conditional appearance in the suit on the ground that the defendant, in his affidavit supporting the application for leave to enter a conditional appearance, had stated that he was applying to the Court for an order that the suit be discharged and made void on the ground that the suit did not lie. Accordingly on the same day, the defendant entered a conditional appearance and then filed an application asking for an order that the plaint in this suit be discharged and made void on the ground that the suit did not lie and could not be maintained having regard to Section 3 of the Indemnity and Validating Ordinance, 1946. The plaintiff immediately applied for an order under 1932 Rule 1 that judgment should be entered in his favour on the ground that the local law does not provide for the entering of a conditional appearance and consequently the defendant had failed to enter any appearance. The two applications were listed for hearing on the same day. On the application by the defendant that the plaint in the suit be made void and discharged, counsel for the plaintiff took the preliminary objection that the defendant was not properly before the Court, because the local law does not provide for entering a conditional appearance.

Held, that the local law makes no provision for entering a conditional appearance and the preliminary objection that the defendant was not properly before the Court must be upheld.

Cases referred to :—

(1) *Joseph v. Len Hup & Co. and another* (1939) F.M.S.R.L. 70; (1940) M.L.J. 49.
(2) *Redditch Benefit Building Society v. Roberts* (1940) 1 A.E.R. 342.
(3) *Hussein v. Chanda Singh* (1935) F.M.S.L.R. 86; (1935) M.L.J. 262.
(4) *Davies v. Burton* 11 Q.B.D. 537.
(5) *Thomas v. Kelly* 13 A.C. 506.
(6) *Leonard v. Nachiappa Chetty* 4 F.M.S.L.R. 265.

SUMMONS IN CHAMBERS.

E. D. Shearn for the plaintiff.

A. J. Grattan-Bellew for the Attorney-General for the defendant.

Willan, C. J. :—In this case the plaintiff claims damages, on grounds which are not material to this judgment, against the defendant who is an Assistant Commissioner of Police stationed in Kuala Lumpur.

On the 30th day of December, 1946, the Registrar granted the defendant leave to enter a conditional appearance in this suit on the ground that the defendant, in his affidavit supporting the application for leave to enter a conditional appearance, stated that he was applying to the Court for an order that the suit be discharged and made void on the ground that such a suit does not lie.

Accordingly, on the same day i.e. the 30th day of December, 1946, the defendant entered a conditional

appearance, and then filed an application asking for an order that the plaint in this suit be discharged and made void on the ground that this suit does not lie and cannot be maintained having regard to section 3 of the Indemnity and Validating Ordinance, 1946.

The plaintiff immediately applied for an order under 1932 Rule 1 that judgment should be entered in his favour on the ground that the local law does not provide for the entering of a conditional appearance and consequently the defendant had failed to enter any appearance.

The two applications were listed for hearing before me on the same day. On the application by the defendant that the plaint in this suit be made void and discharged, Mr. Shearn for the plaintiff took the preliminary objection that the defendant is not properly before the Court, because our local law does not provide for entering a conditional appearance.

Mr. Shearn first referred to 1932 Rule 1 sub-rule 12, the relevant part of which, for the purpose of this judgment, reads as follows :—

> If a person served with a summons under sub-rules 7 or 8 hereof wishes to contest the claim of the party at whose instance the same was issued, or if a person served with notice of a judgment desires to attend the subsequent proceedings and be heard thereat, he shall within the time allowed enter an appearance at the Court from which the summons has been issued or by which the judgment was given, by filing in the Registry of that Court a memorandum of appearance in writing in the form numbered 4 or 5 in the schedule hereto.

Shortly, that sub-rule 12 can be read :—

> If a person served with a summons..... wishes to contest the claim.....he **shall**..... enter an appearance.....by filing.....a memorandum of appearance.....**in the form** numbered 4 or 5 in the schedule hereto.

Mr. Shearn's contention was that the provisions of this sub-rule make it mandatory that the appearance must be entered in either form 4 or form 5 contained in the schedule to 1932 Rule 1, and that neither of these two forms provides for entering a conditional appearance. He cited the case of *Joseph v. Len Hup & Co. and another*[1] as an authority for the proposition that our local Rules of Court contain no provision for entering a conditional appearance.

Mr. Shearn further contended that the defendant's proper course should have been to enter an appearance in form 4 in the schedule to 1932 Rule 1, which is the Memorandum of Appearance where the defendant appears by an Advocate and Solicitor. Then, if the defendant wished to have the plaint struck out because it disclosed no cause of action he could have (a) made a specific application to do so, or (b) embodied such an application in his written statement of defence in accordance with the provisions of 1932 Rule 1 sub-rule 31.

Mr. Grattan-Bellew, who appeared for the defendant on behalf of the Attorney General, submitted that the conditional appearance entered is a proper appearance on the following grounds :—

1. That section 33 of the Federated Malay States Interpretation and General Clauses Enactment (Cap. 1.) permits slight deviations to be made from forms prescribed, and that the form used in entering a conditional appearance is only a slight deviation from form 4 contained in the schedule to 1932 Rule 1.
2. That by section 7 (ii) (a) of the Federated Malay States Courts Enactment (Cap. 2) the Registrar shall perform such duties as he is required by law to do and as are discharged by a Master of the Supreme Court in England. That since a Master in England can grant leave to enter a conditional appearance the Registrar, by virtue of the section just quoted, can likewise grant similar leave. This provision in the Courts Enactment of the Federated Malay States is continued as law of the Malayan Union by section 10 of the Malayan Union Courts Ordinance, 1946.
3. That on the authority of *Redditch Benefit Building Society v. Roberts*[2] the plaintiff cannot succeed in his application for judgment because, irrespective of whether the conditional appearance is a proper appearance or not, the plaintiff is well aware that the defendant is present and anxious to put himself in a position to defend this suit.

By the provisions of 1932 Rule 1 sub-rule 12 it is clear that an appearance must be entered in one of the two forms contained in the schedule to that Rule. On the authority of vol. 31 Halsbury (Hailsham edition), page 466, paragraph 570, cited by Mr. Shearn, if a form included in a schedule to a statute is made imperative by that statute, it must be strictly followed. Hence the question is whether the alterations made by the defendant to form 4 contained in the schedule to 1932 Rule 1, in order to enter a conditional appearance, come within the purpose and scope of section 33 of the Federated Malay States Interpretation and General Clauses Enactment (Cap. 1).

I agree with Mr. Grattan-Bellew's contention that wherever forms are prescribed in the laws of the Federated Malay States, section 33 of the Interpretation

and General Clauses Enactment applies, and the case of *Hussain v. Chanda Singh*[3] is an example of where that section was applied to a form prescribed by the laws of the Federated Malay States. But the point is whether the adaptation of form 4 contained in the schedule to 1932 Rule 1, for use as a conditional appearance is a slight deviation not affecting the substance of either of these forms. There are several English authorities on the construction of the expression "in accordance with the form", which is not so strict as the expression "in the form" contained in the schedule to 1932 Rule 1. According to Brett M. R. in *Davies v. Burton*[4] nothing substantial must be substracted from the form prescribed, and nothing actually inconsistent must be added to it. In *Thomas v. Kelly*[5] it was ruled that a divergence is substantial when it departs from the statutory form in anything which is characteristic of that form or if it gives the particular document a legal consequence or effect either greater or smaller than that which would attach to it if drawn in the form which has been sanctioned.

In England a Master can grant leave to enter a conditional appearance on an *ex parte* application. But in order that the defendant should not obtain such leave for the purpose of delaying the proceedings, a Master, acting under the authority of the Practice Masters' Rules, endorses the conditional appearance with following stipulation :—

> This appearance is to stand as unconditional unless the defendant applies within.....days to set aside the writ, or service thereof, and obtains an order to that effect.

Here we have no Practice Masters' Rules and consequently the Registrar made no such endorsement on the conditional appearance entered. Further, in England, it is laid down in the Annual Practice 1941 edition, page 146, that the plaintiff is barred from taking any step in the action until the time fixed by the endorsement on the conditional appearance has expired.

Here, by 1932 Rule 1 sub-rule 21, the plaintiff has a statutory right and obligation to take out a summons for directions within 14 days after the appearance, and thus proceed with the prosecution of the suit without delay. If the form of un-conditional appearance contained in the schedule to 1932 Rule 1 is altered to make it a conditional appearance, then, according to English law, the legal consequence of that alteration debars the plaintiff from taking any step in the action until a time fixed has elapsed. Thus the position of the plaintiff as regards the prosecution of the suit in accordance with our local law is materially altered. Accordingly, on the authority of the two cases *Davies v. Burton* (supra) and *Thomas v. Kelly* (supra) the divergence from the statutory form is substantial, and Mr. Grattan-Bellew's reliance on section 33 of the Federated Malay States Interpretation and General Clauses Enactment fails.

With regard to his second submission that the Registrar has power by section 7 (ii) (a) of the Federated Malay States Courts Enactment to perform such duties as are discharged by a Master of the Supreme Court in England, and consequently can give leave to a defendant to enter a conditional appearance, this is a proposition to which I am unable to accede. The Registrar can perform such duties and exercise such powers as the local law lays down may be performed and exercised by him. The danger of the indiscriminate reliance on English law was commented on by Reay J. in *Leonard v. Nachiappa Chetty*[6]. There the learned Judge said :—

> Before reliance can be placed on English decisions, particularly decisions on points of procedure, it is necessary in the first instance to examine carefully our local law and to ascertain what it is and in what respects it resembles or differs from the English law. This seems a self-evident proposition, but it is nevertheless too often over-looked by counsel.

With that statement I agree, and Mr. Grattan-Bellew's submission on this second ground fails.

As regard his third and last submission, that on the authority of *Redditch Benefit Building Society v. Roberts* (supra) judgment ought not to be entered for the plaintiff if it is held that the defendant has not entered a proper appearance, Mr. Shearn made it quite clear at the hearing that the plaintiff does not seek to take advantage of the position if it is held that the conditional appearance by the defendant is no appearance. He agreed, in that event, that the defendant should be given time in which to enter a proper appearance.

On the above-mentioned grounds I uphold the preliminary objection raised by Mr. Shearn, and rule that our local law makes no provision for entering a conditional appearance. Accordingly, the application by the defendant that the plaint in his suit be discharged and made void is dismissed with costs.

The defendant is allowed seven days, from and including the date of this judgment, in which to enter an appearance in the proper form. In that event I make no order on the application by the plaintiff to enter judgment, and the effect will be that that application will have lapsed. If, however, the defendant fails to enter an appearance in the proper form within the time stated, the plaintiff is at liberty to proceed with his application to enter judgment in default of appearance.

Order Accordingly.